IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 946 OF 2005
WITH
APPEAL FROM ORDER NO. 963 OF 2005

Premier Automobiles Limited and Ors. .. Appellants (Org.Defts.)

Vs.

Virendra Navnitlal Shah and Anr. .. Respondents (Org.Plffs.)

Mr. Virag Tulzapurkar with Ms. Alpana Ghone i/by M/s. Kanga & Co. for appellants.
Mr. Rohit Kapadia with Mr. Vinod Kothari with Ms. Suchitra Patra i/by M/s. K.V. Aiyer & Associates for Respondent Nos.1 and 2.

CORAM: B.H. MARLAPALLE, J.

Date : October 21, 2005.

ORAL JUDGMENT:

1. Heard. Admit. Respondents waive service.

By consent heard finally.

2. The first appeal i.e. A.O. No.946 of 2005 arises from the order passed by the learned Judge of the City Civil Court at Mumbai dismissing Notice of Motion No.2484 of 2005 filed by the defendants in S.C. Suit No.780 of 2004 and the second appeal i.e. A.O. No.963 of 2005 arises from the order dated 30/6/2005

making Notice of Motion No.2777 of 2004 absolute in terms of prayer clause (a)(i)(ii) in the very same suit. The appellants in both the appeals are the defendants in S.C. Suit No.780 of 2004. The defendants had prayed that the order dated 30/6/2005 allowing the Notice of Motion partly was passed ex parte and, therefore, they had moved a fresh Notice of Motion registered as Notice of Motion No.2484 of 2005 praying for vacating the order dated 30/6/2005 passed ex parte and this Notice of Motion was dismissed on 6/9/2005. Thus, effectively the challenge by the defendants is to the order dated 30/6/2005.

3. In Notice of Motion No.2777 of 2004 the prayer (a) reads as under :-

> (a) That pending the hearing and final disposal of the suit this Hon'ble Court be pleased to restrain Defendant No.2 to 4 from acting in further to and/or implementing of
>
> (i) the resolution no.2 of the ensuing 57th AGM of Defendant No.1 to be held

on 22nd August 2003, purporting to reappoint Defendant No.3 Mr. Arvind Doshi as Director of Defendant No.1 and resolution no.4 for reappointment of M/s. K.S. Aiyar & Co., Chartered Accountants as auditors of the Defendant No.1 Company.

(ii) restrain Defendant No.2 to 4 in any manner acting and/or representing themselves and/or taking any steps or actions as Directors of the Defendant No.1 Company.

3A. Before I proceed to decide these appeals, it is pertinent to note that the Notice of Motion No.2777 of 2004 was, in fact, presented before the trial court and dealt with by an earlier order dated 20/8/2003. By a reasoned order passed on that date the learned Judge of the City Civil Court turned down the prayer for ad-interim order and the Notice of Motion was made returnable on 15/9/2003. From the certified true copy of the roznama in the said suit, it is clear that the

Notice of Motion presented in its draft form on 20/8/2003 was not registered till 17/7/2004 on which date the plaintiffs placed on record a fresh copy of the Notice of Motion and it was registered for the first time on that date. It is, therefore, not known whether the learned Judge who passed the impugned order on 30/6/2005 had the advantage of reading the earlier order dated 20/8/2003.

4. So far as the first prayer in Notice of Motion No.2777 of 2004 and as granted by the trial court is concerned, no reasons are necessary to be recorded to hold that the said order was inoperative even when it was passed on 30/6/2005 and the learned counsel appearing for the plaintiffs fairly stated that the plaintiffs would not press for the same relief. Therefore, the challenge to the order dated 30/6/2005 is required to be examined only in respect of prayer clause (a)(ii) in Notice of Motion No.2777 of 2004.

5. Mr. Tulzapurkar, the learned counsel for the defendants, submitted that the provisions of Section

274(1)(g)(B) of the Companies Act 1956 would not be, prima facie, attracted on the face of the averments made in the plaint on the following amongst other grounds:-

(a) As on 12/12/2001 all the share holders were paid the dividend amount by cheques and thus the alleged failure in that regard did not continue for one year or more;

(b) Even otherwise failure to pay the dividend of Defendant No.1 - Company within the meaning of Section 274 (1)(g) did not invite disqualification against a Director or continue as a Director or for being reappointed as Director of the same company.

5A. He also referred to the observations made by the trial court in paras 9 and 10 of the order dated 6/9/2005 and submitted that there was sufficient material before the trial court in support of the claim of the defendants that the commitment for

payment of dividend was fulfilled by 12/12/2001 but the learned Judge fell in manifest errors in noting that there was no such material placed by the defendants when the order dated 30/6/2005 was passed. Mr. Tulzapurkar in this regard referred to the reply to the Notice of Motion filed by the defendants and the averments made therein stating that as on 12/12/2001 every share holder's dividend was paid by cheque.

6. Whether there was material available before the trial court or not in support of the contentions of the defendants that as on 12/12/2001 all the share holders were paid their dividends is an issue which the trial court will have to re-examine even though the reply filed by the defendants states that it was so done. However, the facts remain that the defendant no.1-Company had sent the payment by cheques and not by dividend warrants. Whether these cheques were in fact encashed or could be encashed on or before 12/12/2001 is an issue which requires verification by the trial court, more so when the plaintiffs came out with a case that as on 12/12/2001 the defendant

no.1-Company had only about five thousand rupees in its account with the Bank concerned and, therefore, the cheques despatched allegedly vide letter dated 11/12/2001 could not be encashed.

7. So far as the issue of applicability of Section 274(1)(g)(B) of the Companies Act is concerned, the averments in the plaint referred to the alleged disqualification suffered by the defendant nos.2 to 4 in their capacity as Directors of another Public Limited Company by name Pal Peugeot Limited and the order passed by this Court on 13th April 2004 in Notice of Motion No.1426 of 2002 filed in Suit No.1708 of 2002 on the Original Side. In the impugned order dated 30/6/2005 the learned Judge of the trial court has not considered this aspect, namely, the disability suffered by defendant nos.2 to 4 as Directors of M/s. Pal Peugeot Limited coming in their way to continue or to be reappointed as the Directors of the Defendant No.1-Company and if the learned Judge had the advantage of perusing the order dated 20/8/2003 passed on the draft Notice of Motion turning down relief of ad-interim order, certainly this aspect could have

been considered. This issue also, therefore, requires consideration by the trial court.

8. The learned Counsel for both the parties, therefore, agreed that both these issues and Notice of Motion No.2777 of 2004 is required to be remanded to the trial court for fresh hearing in respect of prayer clause (a)(ii) as set out therein above. The impugned order dated 30/6/2005 will have to be, therefore, quashed and set aside while remanding the Notice of Motion No.2777 of 2004 for de novo hearing.

9. A.O. No.963 of 2005, therefore, succeeds and the same is hereby allowed. Notice of Motion No.2777 of 2004 is restored to the file of the trial court in S.C. Suit No.780 of 2004 and the same shall be heard and decided afresh in respect of prayer clause (a)(ii) set out therein above and prayer clause (a)(i) stands given up by the plaintiffs. On remand, the Notice of Motion No.2777 of 2004 shall be heard and decided as expeditiously as possible and preferably by 31st December, 2005 along with the Notice of Motion

No.2687 of 2005. Status quo prior to 30/6/2005 shall continue till the Notices of Motion are decided. Undoubtedly the parties are at liberty to file fresh affidavit, documents but this should be done in any case by 16th November, 2005.

10. In view of the above, A.O. No.946 of 2005 does not survive and shall stand disposed off.

. Certified copy expedited. Writ to go to the trial court forthwith.

(B.H. Marlapalle,J.)